No. 14-6166

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

DAVID ANTHONY TAYLOR,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 4, 2014
CERTIORARI GRANTED OCTOBER 1, 2015

262020

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA (ROANOKE), CASE #: 7:12-CR-00043-GEC

Date Filed	#	Docket Text
07/26/2012	22	SUPERSEDING INDICTMENT as to David Anthony Taylor (1) count(s) 1s, 2s, 3s, 4s. (lab) (Entered: 07/27/2012)
		* * *
10/24/2012	55	Jury Notes/Questions as to David Anthony Taylor (ssm)
		* * *
12/04/2012	69	TRANSCRIPT of Proceedings as to David Anthony Taylor for Jury Trial - Day 1 held on 10/22/2012 before Judge Glen E. Conrad. Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov
12/04/2012	70	TRANSCRIPT of Proceedings as to David Anthony Taylor for Jury Trial - Day 2 held on 10/23/2012 before Judge Glen E. Conrad. Court Reporter/Transcriber: Judy Webb,

		Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov
12/04/2012	71	TRANSCRIPT of Proceedings as to David Anthony Taylor for Jury Trial - Day 3 held on 10/24/2012 before Judge Glen E. Conrad. Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov
		* * *
12/13/2012	82	MOTION in Limine *as to the Hobbs Act* by USA as to David Anthony Taylor. (Bassford, Ronald)
		* * *
12/21/2012	95	First MOTION in Limine *to Exclude Evidence of Cocaine* by David Anthony Taylor. (Weston, Seth)
		* * *
12/21/2012	97	RESPONSE to Motion by David Anthony Taylor re 82 MOTION in Limine *as to the Hobbs Act* (Weston, Seth)
		* * *
01/04/2013	102	ORDER denying 77 Motion in

Limine as to David Anthony Taylor (1); taking under advisement 82 Motion in Limine as to David Anthony Taylor (1); granting in part and denying in part 95 Motion in Limine as to David Anthony Taylor (1). Signed by District Judge Glen E. Conrad on 1/4/2013. (ssm) (Entered: 01/08/2013)

* * *

01/25/2013	118	Jury Notes/Questions as to David Anthony Taylor (ssm)
01/25/2013	119	JURY VERDICT as to David Anthony Taylor (1) Guilty on Count 1s, 3s, 4s, David Anthony Taylor (1) Not Guilty on Count 2s. (ssm)

* * *

01/25/2013	155	Jury Instructions as to David Anthony Taylor (ssm) (Entered: 06/03/2013)

* * *

04/24/2013	135	JUDGMENT as to David Anthony Taylor (1 , Count(s) 1, 2, Superseding Indictment Filed; Count(s) 1s, 3s, 4s, CBOP 336 mos. consisting of 252 mos. as to Counts 1 & 3 to run

concurrently, plus 84 mos. as to Count 4, to run consecutively - SR 3 yrs concurrent as to ea Count, FINE $1000, SA $300; Count(s) 2s, Dismissed in accordance w/ Jury Verdict. Signed by District Judge Glen E. Conrad on 4/24/2013. (ssm) (Entered: 04/25/2013)

04/25/2013 137 NOTICE OF APPEAL - Final Judgment to 4CCA by David Anthony Taylor (Weston, Seth)

* * *

05/29/2013 154 TRANSCRIPT of Proceedings as to David Anthony Taylor for Motion Hearing held on January 3, 2013 before Judge Glen E. Conrad. Court Reporter/Transcriber: Janelle Mundy, Contract Reporter, Telephone number 540/342-2547

* * *

07/12/2013 159 Appeal Transcript filed as to David Anthony Taylor for Jury Trial - Day 1 for dates of 1/23/2013 before Judge Glen E. Conrad, re 137 Notice of Appeal - Final Judgment to 4CCA Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-

5100 X 5333/judyw@vawd.uscourts.gov.

07/12/2013	160	Appeal Transcript filed as to David Anthony Taylor for Jury Trial - Day 2 for dates of **1/24/2013** before Judge Glen E. Conrad, re 137 Notice of Appeal - Final Judgment to 4CCA Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov.
07/12/2013	161	Appeal Transcript filed as to David Anthony Taylor for Jury Trial - Day 3 for dates of **1/25/2013** before Judge Glen E. Conrad, re 137 Notice of Appeal - Final Judgment to 4CCA Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov.

* * *

06/06/2014	164	USCA 4th Circuit Memorandum Opinion as to David Anthony Taylor re 137 Notice of Appeal - Final Judgment to 4CCA Affirmed decided on 6/6/2014 (lab)
06/06/2014	165	JUDGMENT of USCA as to David

Appendix A

Anthony Taylor re 137 Notice of Appeal - Final Judgment to 4CCA (lab)

* * *

10/01/2015 204 Appeal Remark re 137 Notice of Appeal - Final Judgment to 4CCA: Copy of Letter from Supreme Court to 4CCA re: granting of petitioner's motion to proceed IFP and petition for a writ of certiorari. (sas) (Entered: 10/02/2015)

Appendix A

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT NO. 13-4316

Date Filed	#	Docket Text
05/01/2013	3	DOCKETING NOTICE issued Re: [1] case docketed Initial forms due within 14 days. Originating case number: 7:12-cr-00043-GEC-1. Mailed to: Seth Christopher Weston. [13-4316] (TF)
05/01/2013	4	APPEARANCE OF COUNSEL (Local Rule 46(c)) by R. Andrew Bassford for US. [999099670] [13-4316] Ronald Bassford
05/03/2013	5	MOTION by Appellant David Anthony Taylor to withdraw/relieve/substitute counsel. Attorney or client motion? Attorney .... [999101306] [13-4316] (TF)
		* * *
05/06/2013	10	ORDER filed [999101979] granting Motion to withdraw/relieve/substitute counsel [5] New attorney appointed: Yes Date counsel accepted case: 05/06/2013 Name of new attorney: Dennis Jones. Representation Type: CJA-TD Copies to all parties. Mailed

to: DAVID ANTHONY TAYLOR - #16709-084 CENTRAL VIRGINIA REGIONAL JAIL 13021 JAMES MADISON HWY ORANGE, VA 22960. [13-4316] (LM)

05/15/2013 11 APPEARANCE OF COUNSEL (Local Rule 46(c)) by Dennis E. Jones for David Anthony Taylor. [999108467] [13-4316] Dennis Jones

* * *

09/20/2013 40 BRIEF by Appellant David Anthony Taylor in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 09/20/2013. [999198068] [13-4316] Dennis Jones

09/20/2013 41 FULL ELECTRONIC APPENDIX and full paper appendix by Appellant David Anthony Taylor. Method of Filing Paper Copies: hand delivery. Date paper copies mailed dispatched or delivered to court: 09/20/2013. Has district court 90-day restriction expired for all transcripts included in appendix? No. The electronic appendix is initially restricted to case participants only. Case participants

must be logged into CM/ECF to view the appendix prior to public release. Appendices in Immigration and Social Security cases will remain restricted. [999198091] [13-4316] Dennis Jones

* * *

12/04/2013 55 BRIEF by Appellee US in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/05/2013. [999252810] [13-4316] Jean Hudson

* * *

05/15/2014 61 ORAL ARGUMENT heard before the Honorable J. Harvie Wilkinson, III, Stephanie D. Thacker and Clyde H. Hamilton. Attorneys arguing case: Kari Elizabeth Jackson for Appellant David Anthony Taylor, Mr. Dennis Jones for Appellant David Anthony Taylor and Ms. Jean Barrett Hudson, Esq. for Appellee US. Courtroom Deputy: Joseph Coleman. [999356818] [13-4316] (JLC)

06/06/2014 62 PUBLISHED AUTHORED OPINION filed. Originating case number: 7:12-cr-

00043-GEC-1. [999371021]. [13-4316] (TF)

06/06/2014	63	JUDGMENT ORDER filed. Disposition method: 13-4316 opn.p.arg. Decision: Affirmed. Originating case number: 7:12-cr-00043-GEC-1. Entered on Docket Date: 06/06/2014. [999371023] Copies to all parties and the district court/agency. Mailed to: Jackson. [13-4316] (TF)

* * *

06/30/2014	66	Mandated issued. Referencing [63] Judgment Order. [62] Published Authored Opinion. Originating case number: 7:12-cr-00043-GEC-1. [13-4316] (TF)

* * *

09/10/2014	70	SUPREME COURT REMARK—petition for writ of certiorari filed. 09/04/2014. 14-6166. [13-4316] (ABW)

* * *

10/01/2015	75	SUPREME COURT REMARK—petition for writ of certiorari granted. 10/01/2015 [13-4316] (SJC)

APPENDIX B — SUPERCEDING INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, JULY 2012 SESSION, FILED JULY 26, 2012

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
JULY 2012 SESSION

Criminal No. 7:12-cr-00043

In Violation of:
Title 18, U.S.C., §1951(a)
Title 18, U.S.C., §924(c)
Title 18, U.S.C., §2

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

SUPERCEDING INDICTMENT

COUNT ONE

The Grand Jury charges:

1. That on or about October 21, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and

attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1)and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, as well as a cellular telephone, from the person and property of "WL," against WL' swill, by means of actual and threatened force, violence, and fear of injury, immediate and future, to WL's person and the persons of his family, and did aid and abet in the same.

2. All in violation of Title 18, United States Code, Sections 1951 (a) and 2.

COUNT TWO

The Grand Jury charges:

1. That on or about October 21, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR, did knowingly possess and brandish a firearm in furtherance of a crime of violence which may be prosecuted in a court of the United States, as heretofore set forth in Count One of this Indictment.

2. In violation of Title 18, United States Code, Section 924(c).

Appendix B

COUNT THREE

The Grand Jury charges:

1. That on or about August 27, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951 (b)(1) and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, from the person and property of "JW," against JW's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to JW's person and the persons of his family, and did aid and abet in the same.

2. All in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT FOUR

The Grand Jury charges:

1. That on or about August 27, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR did knowingly possess and brandish a firearm, in furtherance of a crime of violence

which may be prosecuted in a court of the United States, as heretofore set forth in Count Three of this Indictment.

2. In violation of Title 18, United States Code, Section 924(c).

A TRUE BILL this 26th day of July, 2012.

s/
FOREPERSON

s/
TIMOTHY J. HEAPHY
UNITED STATES ATTORNEY

APPENDIX C — MOTION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED DECEMBER 13, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal No. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

MOTION *IN LIMINE* AS TO INTERSTATE COMMERCE

COMES NOW the United States of America, by counsel, and moves that defendant be prohibited from presenting any evidence or argument in support of the proposition that marijuana dealers might be dealing in marijuana grown in Virginia, and that robbery of a drug dealer selling this "in-state" marijuana would not be a violation of the Hobbs Act. This position is contrary to law, and would serve only to confuse the jury. In support of this Motion, the United States says as follows:

In *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003), the Court dealt with the issue of whether the robbery of drug dealers impacted interstate commerce so as to allow prosecution under the Hobbs Act. The Court

found that it did, stating "Drug dealing, to repeat, is an inherently economic enterprise that affects interstate commerce . . . For this reason, the robbery of a drug dealer has been found to be the kind of act which satisfies the "affecting commerce" element of the Hobbs Act, inasmuch as such a robbery depletes the business assets of the drug dealer." (Citation omitted). *Id.* at 355.

The Court also found that it was not necessary that the defendant have intended to effect interstate commerce or that the effect on commerce was certain; it is enough that such an effect was the natural probable consequence of the defendant's actions. *Id.* at 354.

Relying on *Williams*, the Court came to a similar conclusion in *United States v. Mohamadi*, 461 Fed. Appx. 328 (4th Cir. 2012). In this unpublished opinion, the Court found that a prostitution business was, like drug dealing, of an economic nature and interstate in character. As such, the armed robbery of a prostitute depleted her business assets and affected commerce, making the robbery prostitution appropriate under the Hobbs Act. *Id.* at 335. In passing, the Court also repeated the finding of Williams that the robbery of a drug dealer "impacts a trade that plainly is both economic and interstate in character." *Id.* at 335.

Defendant's effort to parse the difference between marijuana grown in-state, and out-of-state finds no support in this case law. The Fourth Circuit has foreclosed this inquiry, taking the position instead that if the robbery is intended to be the robbery of a drug dealer, the Hobbs Act applies. *Williams* at 355.

Appendix C

The correct analysis is to determine whether the intent of the robbery is to rob a drug dealer. If this question of fact is answered in the affirmative, then the robbery, as a matter of law, affects interstate commerce. Defendant should be prohibited from presenting any evidence or argument to the contrary.

Respectfully submitted,

TIMOTHY J. HEAPHY
United States Attorney

Date December 13, 2012

/s/ R. Andrew Bassford
R. Andrew Bassford
Assistant United States Attorney
Virginia State Bar
No. 42584

APPENDIX D — MOTION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED DECEMBER 21, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NO. 7:12-cr-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

MOTION *IN LIMINE* TO EXCLUDE ANY REFERENCE TO MATTERS INVOLVING COCAINE

COMES NOW your defendant, David Taylor, by counsel, and moves this Court to prohibit the United States from introducing any evidence or testimony concerning any matters pertaining to cocaine in its case in chief, and states the following in support thereof:

1. The defendant is charged with violating the Hobbs Act by using robbery to interfere with interstate commerce, specifically to obtain "marijuana and drug proceeds."

2. The only rational definition of "drug proceeds" is something of value obtained by the distribution of the

drug, which in this case the United States specifically alleged is marijuana.

3. Evidence of an intent or attempt to commit a robbery to obtain cocaine or drug proceeds from cocaine distribution is evidence of another crime, is not relevant in this trial, and should be excluded under Rule 401 because such evidence does not tend to make a fact more or less probable than it would be without the evidence and the fact is of no consequence in determining this action.

4. Even if such evidence is relevant, it is not admissible under Rule 403 in that its probative value is substantially outweighed by the danger of unfair prejudice, that it would confuse the issues, it will mislead the jury, cause undue delay in this trial, waste time, or result in needlessly presenting cumulative evidence of other uncharged crimes.

5. Such evidence is not admissible under Rule 404, as it does not assist the trier of fact in proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident as any of these pertain to the crime charged.

6. Should the United States intend to introduce such evidence under Rule 404, the Defendant moves this Court to order to United States to notify the Defendant of its intent to introduce such evidence, the specific information sought to be introduced, and the authority under which such evidence is admissible.

WHEREFORE, your defendant, David Taylor, by counsel, moves this Court to prohibit the United States from introducing any evidence or testimony concerning any matters pertaining to cocaine in its case in chief, or any other relief deemed appropriate.

Respectfully submitted,

DAVID ANTHONY TAYLOR

/s/Seth C. Weston, Esq.
Seth C. Weston, Esq.
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APPENDIX E — MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED DECEMBER 21, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NO. 7:12-cr-00043

UNITED STATES OF AMERICA,

v.

DAVID ANTHONY TAYLOR.

MOTION TO DISMISS THE MOTION IN LIMINE AS TO INTERSTATE COMMERCE FILED BY THE UNITED STATES

COMES NOW your defendant, David Taylor, by counsel, and moves this court to dismiss the Motion in Limine as to Interstate Commerce filed by the United States and in support thereof states:

1. Preventing the defendant from presenting evidence on his behalf is odious to the founding principles of our country and a direct violation of the defendant's Constitutional rights under the Fifth and Sixth Amendments.

2. Counsel can find no reported case prohibiting a defendant from producing evidence or argument on his behalf as the United States has motioned the court to do.

3. Moreover, there is no evidence before the court upon which this court could rule upon this motion, and any such ruling would simply be an advisory opinion as to what the court may rule IF the evidence produced during the trial by the United States comports to its motion.

WHEREFORE, your defendant, David Taylor, by counsel, moves this Court to dismiss the Motion in Limine as to Interstate Commerce filed by the United States, or any other relief deemed appropriate.

Respectfully submitted,

DAVID ANTHONY TAYLOR

/s/ Seth C. Weston, Esq.

APPENDIX F — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, DATED JANUARY 3, 2013

[1]IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

7:12-cr-00043

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID ANTHONY TAYLOR,

Defendant.

PROCEEDINGS HELD BEFORE THE HONORABLE GLEN E. CONRAD, CHIEF JUDGE

January 3, 2013
1:05 a.m. to 12:05 p.m.
Roanoke, Virginia
Motions

[2](January 3, 2013, 11:05 a.m.)

PROCEEDINGS

Appendix F

THE COURT: Good morning. I'll ask Ms. Mooney to announce the style of the next case.

MS. CLERK: *United States v. David Taylor*, criminal action 7:12-cr-43 for a hearing on motions.

THE COURT: We have cross motions in limine. I wonder who wishes to go first. Mr. Weston.

MR. WESTON: Judge, that's fine. On behalf of the defendant, we've filed three motions on our own. I think the government filed four and replied to three of those. I guess we'll take up the motion to appoint an expert on behalf of my client. I submitted to the Court a proffer, and I made available a copy to the government of what I propose the expert would testify to if she's appointed and allowed to come to trial. It's about four pages long. Does the Court wish to read that over?

THE COURT: I looked at it briefly before we came into the courtroom. I haven't read the entire thing. Do you think it would be helpful to me to read it before I rule?

MR. WESTON: Probably, Your Honor; yes.

[3]THE COURT: All right.

MR. WESTON: I will go over the highlights.

THE COURT: Let's take a moment for me to read it.

MR. WESTON: Yes, sir.

(Court reading document.)

THE COURT: Okay. I had a chance to read over the report.

MR. WESTON: Thank you, sir. In the proffer I asked that it be mark as defendant's one for today's purposes, the proffer. We have had a trial on this so there is some idea what testimony what might lead to in Court. Although, I understand there is a new trial and therefore testimony will be different. But in assuming some of the testimony might come out the same, in terms what the witness testified to and how they identified my client. I suggest to the Court that that is the reason why this Court ought to allow her to be court appointed to assist in this case.

Some of the things in the case law here, particular in this circuit I've looked at, she deals with directly in the proffer. For instance, the effects of stress on memory. There have been studies in the years that have flushed out, so to speak, and made more valuable the opinion of these experts.

[4]Back in 1985 the *United States v. John Downing* this was relatively new and the Court called it new, this type of evidence. It's no longer new. It's been studied and shown to be reliable throughout the last 20-odd years. The effects of stress on memory the witnesses, the Court remembers, testified about somebody breaking into the house. There's guns, there's kids being thrown about. The

other witnesses talk about being hit by the suspects and the demanding of money or drugs and such. Obviously, a very stressful environment for somebody to try to remember what happened.

Additionally, at the time one set of witnesses clearly, in court last time, admitted and stated at the time they identified four people, one of whom was my client, as being the four people that came into the house that time. Although, they then saw a photo line-up about two and a-half years later and said it wasn't one of those four. It was, in fact, my client. These studies show the problem in that type of identification process. The effects of stress on memory have been shown, and she has put in there samples and confidence levels, if you will, of how that effects memory. How that effects people when they are trying to recall what occurred when they are under stress.

At the very last part of her proffer a [5]30 percent of the sample of 1,000 potential jurors in DC were given a test. Thirty percent understood stress decreases memory of detail. Thirty-nine percent erroneously believed stress makes a witness' identification more reliable, the exact opposite of what the studies show.

I suggest to the Court then that shows the Court that this stress effect on memory outside the normal perspective that a juror brings to the table that they wrongly assume stress increases memory when, in fact, it does the opposite. We need an expert to show that to the jury. Otherwise they'll mistakenly believe that 39 percent believe that makes it more reliable.

Additionally, the weapon was present, according to the witnesses. This is a highly distracted factor, according to studies that have been done. Although, as put forth in the proffer, jurors, potential jurors, actually think just the opposite. It makes them more reliable. They did some tests and had tests in there that the Court can read all about percentages and how it affects memory. Cross-racial identification was also a factor in here. If the Court remembers, one of them stated and named a person, if memory serves me right, a person they knew for 20 years as being the black person that committed this and then two and a-half [6]years later picked out my client. There are confidence levels she puts in that proffer that show how this affects memory. Again, two and a-half years after the crime these witnesses picked out a photo spread of my client. There are confidence levels put forth in that studies now showing, none show two and a-half year delay. They didn't go that far out. They did a month or two months or so. But the studies show a marked decrease in the levels of correct suspect identification even a month later.

In this case the evidence was the photographs were shown twice to the people, to the witnesses, which is called a second pass, according to this expert, and that is shown to adversely affect the levels of correctly picking out a suspect.

Judge, I would suggest to the Court given the ruling, the prior ruling in *Drowning*, and has been interpreted later in this Fourth Circuit, *United States v. Harris*, which is 995 F.2d 532, and other subsequent cases. These are the type of factors that the appellate courts look for in deciding whether to allow this type of evidence in.

Now, the Court understands the appellate courts are looking for discretion by the Court. That's their standard. It's not whether you should or should [7]not have allowed this evidence to come in. It's whether this Court uses its discretion in allowing it. It is clearly allowed under the law, and I suggest to the Court, given this proffer and the evidence we expect in court, that this expert ought to be allowed to be court appointed to assist in this case, Judge. Does the Court want the Government to respond?

THE COURT: Do you want to go item by item, Mr. Bassford?

MR. BASSFORD: It might go easier. Your Honor, we looked at the issue a little bit differently in terms of what the standards are for what the Court should appoint an expert or not. Probably the most widely cited case is the *Perrera* 842 F.2d 73, which stands for the proposition in order for the Court to appoint an expert it requires a showing that the expert is necessary to the defense and the defendant would be prejudiced by the non-appointment of the expert.

That's the standard normally cited but probably not the most helpful standard ever given. There is a case that expands a little bit further, *Williams v. Martin*, 618 F.2d 1021. That's a Fourth Circuit case out of 1980. The standard they cite there is when a substantial question exists over an issue requiring expert testimony for its resolution and the [8]defendant's position cannot be fully developed without expert assistance or professional assistance, then the Court should appoint an expert.

So how that translates is that if the government's case depends on an expert to bring forward some sort of technical testimony outside the providence of lay people, then it might be prejudicial to the defendant not to have their own expert to combat what the government is bringing. But that's not what we have here. We have a matter of whether a witness identification is to be believed or not; whether it's credible identification or not. That's a matter within the jury's experience. They can judge the demeanor of the witnesses, judge the circumstances, listen to cross-examination, since the Court recalls this was a matter that was cross-examined on in the previous trial.

And, Judge, based on all of that, so in the government's view, because the government is not bringing forward a witness to talk about something that wouldn't be within the province of the jury, that the defendant then is not prejudiced by the lack of having a witness. Indeed, the defendant is quite able to cross-examine and do the things any defendant could do.

Witness identification is just something that is very much within common experience. For that [9] reason, Your Honor, based on the standards in these cases, the government is not of the view that an expert is necessary for this defense and not of the view that this is someplace where his position cannot be fully developed without professional assistance.

THE COURT: Mr. Bassford, does the government believe that this second trial will proceed pretty much the same as the first in terms of the witnesses offered by the United States?

MR. BASSFORD: Your Honor, I think it's fair to say that the Court will be seeing a lot of the same witnesses; not all, maybe some additional witnesses. But clearly when you have victims it's necessary to bring them forward.

THE COURT: Well, I mean, as I recall last time we only had one other person who supposedly was a member of this illusive associated group. Do you anticipate having more of those people this time?

MR. BASSFORD: Yes, Your Honor.

THE COURT: Do you anticipate those people will identify Mr. Taylor as someone who accompanied them on some of these break-ins?

MR. BASSFORD: Yes, Your Honor.

THE COURT: So it's your belief that the government's case won't turn in terms of identification [10]as much on the victim's testimony as was the case last time?

MR. BASSFORD: Your Honor, there will be additional evidence from at least one other person who is involved in these things. Further, of course, as the Court recalls, there is a matter of confessions and statements and things like that, which alter or corroborate the witness identifications.

THE COURT: Thank you, Mr. Bassford. Mr. Weston, anything else you would say about it?

MR. WESTON: Yes, sir. As to additional witnesses, Judge, my client is not charged with conspiracy. And, frankly, on behalf of my client, I don't want to get into rules of evidence and objections to witnesses testifying, but unless -- the person that the government called to testify could not state they were involved in a particular crimes charged. I would anticipate objecting to that person testifying again. In fact, he testified to getting money, $300, is what he said, that neither sets, as the plaintiff testified, was stollen from them. It's obvious then evidence of another crime. He's not charged with conspiracy. I don't believe -- I don't recall whether they even mentioned the gang that's supposed to be associated with at trial in the case in chief.

[11]THE COURT: Okay. If someone else comes and says, yes, we conducted some of these break-ins; and, yes, David Taylor was someone who accompanied us. It seems to me that comes in.

MR. WESTON: It might, Judge, but the Court would need to have some kind of ruling about what the basis of testimony is going to be and how it is associated with these two particular charges. We are kind of operating in the blind here where the government is asserting they are going to bring in other people to describe other break-ins and allege he's involved in it.

THE COURT: It goes to this very matter of identification; whether or not this was the particular individual who is present on these two occasions. So it seems that's fair game. We didn't have it the last time but

it very well might be the case that that kind of evidence is proper next time around.

MR. WESTON: The Court is right; it may be. We need to find out what it is they are trying to do with these witnesses.

THE COURT: Mr. Bassford's reputation is that's going to be what the government intends to do this time.

MR. WESTON: I understand. I may very well object to the other evidence coming in depending upon [12] what they're going to testify to. But in terms of this, this expert, Your Honor, I will suggest that the government is misreading the standards and in *United States vs. Harris*, which is 995 F.2d 532 from 1993, sets forth that the standard by which the Court appoints experts and, in fact, even talked about, in that case, eyewitness testimony on page three of that. The Court said the narrow circumstances held sufficient to support the introduction of expert testimony have varied but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference.

And then they go and cite other circuits' decisions on allowing and not allowing expert testimony. But all of those things that the appellate court put out as factors are present in this case. This Court uses the rules in determining whether or not to allow expert testimony in as I am suggesting. I would suggest in her proffer she

sets forth the fact that it's scientific and reliable and it's needed and why and those in particular as the Fourth Circuit looked at –

THE COURT: That's one of the problems I have with these experts. She bases her opinions on [13]studies that are made that include a number of variables that are not present in our case. So it's hard to make the transition from those situations, those experiments she has conducted, to the identifications that are said to have occurred here.

MR. WESTON: She confided to the variables set for in her proffer, all of which were in this case and the testimony last time.

THE COURT: Ultimately, the testimony is just as any lay person would understand, that memory fads over a period of time. That would be the conclusion that she would draw from the studies that she's conducted. And that people don't concentrate as well during episodes of stress. That would be the constant. That would be the factor that she would extrapolate from the experiments that she completed to the situation in this case. Those constants are things that everyone understands to be operative factors.

MR. WESTON: That's the problem, Judge. In her proffer she dealt with those when they asked jurors that did these studies. In fact, the studies showed just the opposite. As I mentioned already, there's one study that shows, I think, that 39 percent incorrectly believe it did not affect. The study showed just the opposite. While most

people think it's common knowledge [14]that stress affects people, they don't.

THE COURT: I wouldn't let her render that opinion anyway, because she is being proffered as an identification expert not a jury expert. She wouldn't be competent to make that observation anyway; that the jurors concentrate on the wrong factors or that jurors don't perceive things correctly.

MR. WESTON: I didn't mean the jurors. The studies showed the confidence level of people that he asked and it showed the exact opposite. On page two of the effects of stress on memory, 1,000 potential jurors were asked and that was the study and 30 percent said stress decreases memory and 39 percent erroneously believes stress makes memory more reliable. Those studies that shown the opposite --

THE COURT: Those human-factor observations are just not admissible through an expert. Arguably, she can come in and talk about how identification is impacted by certain factors; stress, the passage of time, racial disparity. That would be appropriate in certain circumstances. I am not sure any of those are present here. But as to the way people perceive these things, we're asked to consider the issues that are offered in a particular case, that is beyond the area of expertise for which she is being offered as an expert. [15]She is an identification expert.

MR. WESTON: Yes, sir; and I think that the studies she is relying upon, well unfortunately, I can't change the

studies. Those are the studies she cites and those are the way they do those studies. They classify those people as potential jurors. I don't have any information on why they use the term potential jurors as opposed to 1,000 random citizens but that's the studies they use, Judge.

THE COURT: I think you're missing what I'm saying. She can come and testify that people don't identify someone involved in an incident as well two years later as they might have two days after the incident occurs. That's what an identification expert will do. But for her to come and say, well, 39 percent of the people believe that the identification would be just as accurate two years after the incident, as it was two days after the incident, that's beyond her area of expertise, at least the area of expertise that we could have her qualify as an expert to render an opinion.

MR. WESTON: I understand. I mentioned it, though, because in the appellant decisions they are talking about confidence levels. I wanted to put it out there. These studies show these confidence levels. That's why I wanted to proffer that to the Court so the [16]Court understands where I'm coming from and ask for this expert to be able to testify.

THE COURT: Thank you. Anything else to be said about it? Well, I will consider the arguments today and consider the pleadings that have been tendered and it's the Court's opinion and belief that we simply don't need an identification expert in this case. I don't usually have such experts. Only in very unusual circumstances, none

of which appear to me to be present here. As I indicated a moment ago, these are considerations that most people understand. It's common sense and really a jury doesn't have to have an expert to tell them about how memory fades, about how people have difficulty sometimes making cross-racial identifications, about how stress impacts someone's ability to understand and remember.

After all, the jury was unable to reach a verdict the first time this case was tried without an expert in identification issues. It seems to me there would be very little prejudice, no prejudice suffered by the defendant, if such an expert is disallowed. I'm going to decline to a point an expert in identification issues at the government's expense and let the matter be tried, at least in that respect, as it was before.

Mr. Weston, what is the next issue?

[17]MR. WESTON: Judge, just for the record, I object to the Court's ruling for the reasons stated on the record.

THE COURT: Objection noted.

MR. WESTON: I just picked up my motion in limine to admit photographs, certain photographs. I have subpoenaed and obtained booking photographs of my client from the Roanoke city sheriff's department that show him at certain times around, I think, 2008 to 2010 generally looking the same facial hair features as he does right now with bald hair. Although he's a little older now than the pictures. I intend on introducing this, Judge, because in

the trial one of the male witnesses testified under oath before a grand jury that the suspect had orange hair. This matters to identification, Judge. Obviously that's a significant factor. Orange hair is not normal. It's rather rare among citizens, I'd suggest, and my client has never had orange hair. These pictures properly show him. I don't think the government's objection to the fact that they depict him as he was. I think their objection was around August or October of 2009, we don't have a picture, or I don't have a picture and I can't help that. He testified what he looked like. I don't think it detracts or hurts the government's case that much [18]that it's more probative -- more prejudicial than probative. It is what it is. It helps the defendant contest one of the eyewitness identification aspects by one of the witnesses in this case.

THE COURT: Mr. Bassford, what is your opinion on this issue?

MR. BASSFORD: Your Honor, it's probably not accurate to say that the photographs come from around those times. The photographs were taken in May and September of '08 and then in June and November of '10. The robberies were in August of '09 and October of '09. So the Court will note there is a certain distance in time from when the robberies took place and when the photographs were taken. As counsel admits, they are designed to explore what facial hair or head hair Mr. Taylor had at the time of the robberies.

I suspect, if the Court were to be asked, it would tell most observers that when Mr. Bassford comes to court he is clean shaven and so it would be on this day.

THE COURT: No longer.

MR. BASSFORD: No longer. But until then, until today, the Court would conclude this would always be so and pictures taken would be probative of now. I would submit to the Court it's much the same thing. [19]That photographs taken from a year prior or a year after are simply probative of nothing. They make no fact in issue. They have no relevance.

THE COURT: Don't they demonstrate that people's appearances change or may not change? A particular individual may undergo very substantial changes or relatively no changes over a period of time. It dovetails what I said a moment ago. People have their own understanding about identification issues and years after an incident occurs, and I think a progression of photographs is helpful in letting folks understand that sometimes it's difficult to make these identifications years after the fact.

MR. BASSFORD: Well, Mr. Taylor in the photo appears to look much the same in each of them.

THE COURT: Then it makes your point that much easier. He's easy to identify. That he has not undergone radical changes over a period of time.

MR. BASSFORD: But to make the point that in 2008 he has no hair on his head and in 2010 he has no hair on his head; therefore, he must not have hair on his head. In 2009 is just -- those things are not logically consistent. One cannot make that assertion; therefore, it could serve no purpose other than to confuse the jury.

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THE COURT: It serves several purposes other than that, it seems to me. It seems to me that it does more good than harm. I have difficulty seeing how the jury would be greatly confused by viewing photographs that have been taken in different time periods.

MR. BASSFORD: This time period is distinct and they are being used to show something that is transitory.

THE COURT: They are being used to show that his appearance has changed or not changed over a period of time. It helps the jury understand this fact of nature. People do change. They look differently in 1999 than they did in 1995.

MR. BASSFORD: I think it goes to a narrower issue as far as the hair and beard. There is an argument with the Court that people's features change over time as they age. But to say that someone has or has not a beard or had or had not hair on their head in 2009 when we have clean shaven photographs in 2008 and 2010.

THE COURT: Well, if that's the case then it goes to the point that was made a moment ago and that is that it's difficult to make these identifications at times that are removed from the time of the incident. It seems to me it does more good than harm in helping [21]the jury. So I'm going to let the photographs come in.

MR. WESTON: Judge, the other motion I filed I guess kind of dovetails to the discussion before about other witnesses testifying. I put in a motion in limine to exclude

any matters involving cocaine. The particular indictment in this case says marijuana and drug proceeds. As I said forth in my motion, this case ought to be limited then to robbery of a marijuana trade, for lack of a better way to put it. Once the government is allowed to throw in any other cocaine, for instance, or any other drugs, that's outside of the scope of the indictment. That's evidence of other crimes to which my client has not been charged. He is not charged with conspiracy. He is charged with two discrete acts of trying to rob marijuana in violation of the Hobbs Act.

THE COURT: Well, I'm not so sure of that. I mean, he is charged with attempts to commit robberies of marijuana in violation of the Hobbs Act.

MR. WESTON: Yes, sir; attempts are in there. But again, it's marijuana. If the Court remembers also the government played the 911 tape.

THE COURT: If the government says he engaged in efforts to break-in and attempt to steal cocaine on other occasions and similar circumstances, it [22]seems to me that would be fair game.

MR. WESTON: I would object to it being more prejudicial than probative of whether he committed other crimes. If the government wanted to charge him with also attempting to rob cocaine dealers, it should have included that in the indictment. For the United States to come in and say, oh, we charge him with trying to rob marijuana, but ladies and gentlemen, we have evidence he also did cocaine and heroin. We're not on fair notice of --

THE COURT: You don't think it would be probative of his conduct on these two charged occasions to be able to show that on another occasion he had attempted, in very similar circumstances, to break into the residence of a person who he felt was a drug dealer to rob that individual of cocaine. It seems to me it would be very probative, very helpful and very admissible.

MR. WESTON: Judge, obviously on behalf of my client, I do not agree. If the Court is going to rule that way, it's inflammatory in showing some other series of other crimes that is not associated with these particular charges. If the government has some kind of evidence of proof, that would have to come out in court. But again, from the defense –

[23]THE COURT: Do you think we are talking about testimony from other members of this association of people, this group that's been called the Goonz. Is that how you envision such testimony as being offered?

MR. WESTON: I can only assume that, yes, Your Honor, because that's what we've alleged in the first trial. But again, I don't recall them ever putting somebody on the stand and saying – actually exploring that detail of it. Again, he is not charged with conspiracy, either. He is charged with these two acts and the evidence before the Court and the witnesses were four people, not a bunch of other people and not a bunch of other crimes.

He is not charged with a length of time, for instance, like they normally do in these types of cases, drug dealing

from May 2009 to June of 2010. He is charged with two discrete acts. To allow the government to explore other crimes and other people coming in and say I did these other crimes with him that are not geared towards robbing a marijuana dealer on these two days, are very prejudicial to my client.

THE COURT: Mr. Bassford, what do you have to say on this point.

MR. BASSFORD: I think counsel is engaging in a strained reading of the indictment. It says [24]marijuana and drug proceeds. It doesn't say marijuana and proceeds of selling marijuana. That was kind of the rationale of the Goonz was to take drugs and drug proceeds and frankly anything else they wanted. From the reporting we know in one case it was where's your money, where's your weed, where's your money, where's your weed. But there is really no justification for looking at the government's case to just proceeds of the sale of marijuana, because I think the evidence was certainly from Lewis and from Claytor that they were there to take drugs and drug proceeds, and I think any other witnesses might say the same thing as well. So in the government's view, defendant's reading of the indictment just goes too far.

THE COURT: Anything else to be said about it, Mr. Weston?

MR. WESTON: Just briefly, Judge. I would suggest to the Court it's the only rational reading of it. The government made the indictment and charged my client.

It should be stuck with the four corners of the indictment; said marijuana and drug proceeds. The only rational drug proceeds would be from the illegal sale of marijuana --

THE COURT: Not necessarily.

MR. WESTON: -- cocaine, they should have [25] indicted him for those other charges.

THE COURT: Well, thank you. As I indicated a moment ago, it seems to me that it depends on the context in which the evidence of involvement with cocaine is offered. But in the proposition that I advance, it seems to me that such testimony would be admissible, if someone came in and said that David Taylor accompanied me on an effort to break into the home of a cocaine dealer or steal drugs and drug proceeds. It seems to me that would be admissible and helpful in understanding whether, in a very similar scenario, David Taylor was involved in the two incidents charged in this indictment. So again, I'm not going to rule on this today. I am going to wait and see how the evidence is offered and what context it's presented. In the context that I mentioned, it seems to me it would be admissible under Rule 404b.

Anything else, Mr. Weston?

MR. WESTON: Judge, those are the motions that I filed. The government filed four, and I will tell the Court the government intends to call a witness twice. I have no objection how the government wants to put on its case. It's up to the government how it wishes to proceed. I will wait for the government to put forth the other three.

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[26]THE COURT: Mr. Bassford, what are your motions?

MR. BASSFORD: Your Honor, the first of our motions is in regards to interstate commerce and how the Hobbs Act was implicated. It seems to me that we kind of got going down the wrong road last trial, without perhaps considering the *Williams* case. And indeed, the other case that follows from it, the *Mohomitty* case. Both of which seems to stand for the proposition that if you are robbing someone with the intent of steal from a drug dealer then you are, in fact, affecting interstate commerce. The distinction that was brought about in state marijuana versus interstate marijuana is really artifical. It doesn't exist in the law.

THE COURT: I'm not sure I remember Mr. Weston making a big point about that. I'm not sure that's where the jury decided the case, at least some members of the jury, against the government. It seems to me that the area of confusion lay elsewhere. I know I granted Mr. Weston the opportunity to contact jurors.

Did either one of you contact the jurors and find out exactly what the point of contention among the group might have been?

MR. WESTON: I had contacted a few of the jurors.

[27]THE COURT: Were you able to get a straight answer on that? What did they hang up on? What issue couldn't they agree about?

MR. WESTON: I am a little reluctant to advise the Court in front of the government. They may well be able to use that strategy to better enhance their case at the expense of my client.

THE COURT: Did the instruction on the interstate commerce vis-a-vis drugs provide any basis for confusion?

MR. WESTON: Judge, may I approach?

THE COURT: Sure.

MR. WESTON: If the Court orders me to answer I will. Judge, but again, they have investigators. They can go out and talk to jurors also. I really believe this is getting in an area of trial strategy, and I'm reluctant to advise the Court. Perhaps if we can do it ex parte, I would be more than happy to advise.

THE COURT: I think you have said enough for me to understand that Mr. Bassford's motion about the marijuana is probably well taken. I think that I'm going to have to prohibit you from making that argument on exactly those terms; on the terms set forth in Mr. Bassford's motion.

[28] Now, I think there are other things that you could argue about the marijuana; whether these people were actually drug dealers, whether there was any attempt on Mr. Taylor's part to steal drugs. There are other arguments that can be made that implicate the marijuana. But at least in terms of Mr. Bassford's motion, it seems to me that on its four corners it has to be granted.

MR. WESTON: Judge, may I have the Court explain the ruling so I'll be sure for my trial purposes.

THE COURT: Well, I'm not going to explain my effort to engage in speculation as to what might have impacted the jury. But in terms of what Mr. Bassford stated in his motion -- let me see if I can find that.

MR. WESTON: I don't object if the Court's ruling --

THE COURT: The Court's ruling is that the defendant may not present any evidence or argument that the robbery or attempted robbery of drug dealers who deal only in Virginia-grown marijuana would not violate the Hobbs Act.

MR. WESTON: I understand the Court's ruling. I guess depending upon how the evidence comes out in the trial, Judge, I may have to have an ex parte [29]ruling after the evidence is in, perhaps depending upon the evidence. If I understand the Court's ruling, I don't object to the government's position that these case laws stand for the fact that drug dealing in interstate commerce but there maybe other avenues of defense, Your Honor.

THE COURT: It seems to me, as I recall the evidence from the first case, there are certain other avenues that might be pursued about the drugs and about the attempt to steal drugs that would not be covered by this ruling. Just so everyone understands to the extent those avenues exist, as of today, the Court considers those to be fair game for the defendant. Okay.

What is the next matter, Mr. Bassford.

MR. BASSFORD: Your Honor, I have one more housekeeping matter, and then I will turn it over to Ms. DeGraw for the last two motions. I wish some clarity from the Court so we don't mess anything up later on.

Mr. Taylor testified the last time and in the government's view, were he to testify again, the government would be free and able to ask him questions about his previous testimony under oath. Does the Court see any problem with that proposition?

THE COURT: Well, it depends on the question and depends on which excerpt from his previous testimony [30]you would question him on. I don't think that you can ask him questions about matters that he testified to the first time that were not mentioned the second time. You can't impeach him on something that's not said during the trial in front of a particular jury that's trying the case.

MR. BASSFORD: For example, Your Honor, say he put on a theory of innocence in the first trial, and then he comes on the stand and doesn't mention the same theory of innocence but gives an alternate theory of innocence.

THE COURT: Just off the top of my head, I would say, no, that's not appropriate. The jury is charged to consider his testimony at this trial. He may not even testify at this trial; who knows. But if he testifies and just goes and speaks in terms of his own character and his own history, then it seems to me that cross-examination would be limited to those matters, and you can impeach

him with things that he said at the time of the first trial, as to those issues, as to those propositions.

MR. BASSFORD: Where the government is concerned is -- so he presents some theory of innocence at the first trial, he should not be free to abandon that and invent something else in the second trial and [31]yet not be held to account for the change in position.

THE COURT: You have to give me a more concrete example. He said he didn't do it.

MR. BASSFORD: Well, he said more things than that, Your Honor. He said, for instance, he was incapable of doing it, because he has arthritis and he can't hold a gun. Now, what if he doesn't say it on the stand the second time and says something else that is similar.

THE COURT: Depends on what he says. If it has to do with holding a gun and using a firearm, I think that perhaps you could. But if he doesn't mention his capacity to engage in a crime that involves a firearm, it seems to me that you would be excluded from asking him questions about things he may have said at the first trial.

MR. BASSFORD: I bring this up so the Court can think on it, because in the government's view were Mr. Taylor to testify again, and were he to differ in factual matters, not necessarily matters of character, you know, perhaps, this would be a prior inconsistent statement.

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THE COURT: Whether it qualifies as a prior inconsistent statement, you could ask him those questions. That's not what I understood you to be [32]suggesting.

MR. BASSFORD: If he says (a) here and (b) here, then there would be prior inconsistent statement, if it's within that narrow area. But if he propounds a theory of innocence of one sort in the first trial, abandons that and comes with a totally different theory of innocence, where the two may, in fact, be inconsistent, the government would like to be able to address this.

THE COURT: His defense was I was not there. I did not do it. When he went on, though, he said I couldn't have done those things that I have been said to have done in any event.

MR. BASSFORD: Well, it's the part I couldn't have done those things is most intriguing to the government. If the things that were preventing him from doing it the first time don't come up the second time, or we have new things that prevented him or whatnot, it seems he would be fair game.

THE COURT: If it deals with his capacity to hold a firearm, I think I am going to have to hold you to a pretty strict limits on that issue.

MR. BASSFORD: Well, that or perhaps other things. The government's goal is just to make it so he doesn't have a free pass to invent something else for [33]this trial.

THE COURT: Well, apparently it's not something that we are not going to be able to rule on today.

MR. BASSFORD: As long as the Court is thinking about it, I've done what I need to do, Your Honor.

THE COURT: Fair enough.

MR. WESTON: I think the Court is correct. We can't rule on evidence not before the Court yet. We'll probably take this up at trial should my client decide to testify.

THE COURT: Fair enough. What else.

MS. DEGRAW: Your Honor, I will be addressing the motions as to the witnesses, Ms. Muse as well as Mr. Beale and Officer Preston together. It's much the same argument by the government for both of these motions. There are actually three bases why these witnesses should be allowed to testify. The first and probably strongest argument is as evidence of specific contradiction. As outlined in the motion, there were several items that these witnesses would be able to address and that testimony we anticipate may come through the defendant, himself, or through any other witness that the defense may put forward. Specifically [34]addressed in the motion, the defendant's capacity and ability to carry a firearm and whether or not he would be able to do that, as well as his capacity for violence. And, the fact that he only, in his prior malicious wounding conviction, acted to protect his sister. These items would not be collateral evidence, extrinsic evidence including other witnesses, could be used to testify to. These go to the heart of the matter of trial. Specifically whether the defendant would be able to carry

out these actions and use a weapon, such as a firearm. The prior malicious wounding involved an actual stabbing and that injured somebody's spine using a weapon. That is a much more, I guess, forceful act than actually being able to operate a firearm.

THE COURT: You are speaking of only evidence in rebuttal?

MS. DEGRAW: Right now I'm speaking of rebuttal, specifically anticipating the defendant or any of his witnesses may testify to. Also the next item I would be addressing is the 404b. This specifically asks for rebuttal, as we anticipate the defendant may testify to some of these items, again, based on reviewing the prior transcripts.

THE COURT: I think I've already ruled the earlier incident of malicious wounding is not coming in [35] as direct evidence. So that's out. Now, if he would happen to get up on the stand and testify this time that I could use a firearm, then perhaps. It's likely that would come in as rebuttal evidence.

MS. DEGRAW: Also, Your Honor, specifically as to that act, he testified that his motivation for that was in defense of his sister and tried to make that sound as if it was some type of helpful act. These witnesses would actually be able to offer testimony that that was not the purpose.

THE COURT: Possibly. Depends exactly on what he says. That's something we're not going to rule on today, either.

MS. DEGRAW: As to the other witness, Ms. Muse would be offered also based on the investigation and what the government determined she would be able to offer testimony about the defendant's ability and the fact he did carry a firearm regularly. So she observed personally in dealings with him. She also would be able to testify to, based on some of the dealings with the defendant, if he testifies, as the government anticipates he would, his non-violent character and other things that matter that he put forth such as being a good father and things like that. There's specific evidence –

[36]THE COURT: It depends on exactly what he says. As to the former, probably that comes in. His habit for carrying a firearm, if he testifies that he couldn't carry a firearm. As to the latter, those subjective issues, it's not likely that that comes in; good father, good Christian, good person. She probably can't impeach him on that testimony other than to say he is not. She is not going to be allowed to say he beat me up.

MS. DEGRAW: Even if the defendant testifies that he's a non-violent person, Your Honor, and opens that character door?

THE COURT: Probably not. It depends on what exactly he might say.

MS. DEGRAW: As for her and 404b purposes being offered, as the motion addressed, there was one specific act between the defendant and Ms. Muse that would go towards identity and some of these things that are being placed in issue and are being called into question. Also

it would go towards motive and common scheme of plan; specifically, this witness would be able to testify that the defendant on one occasion actually robbed her and in similar to one of two robberies that are actually charged here ripped rings off of her/a female's finger and stole those items, the jewelry, the [37]rings, forcefully off her finger as well as electronics including a cell phone and some other items which are similar to the robbery involving LaTocha Gram where rings were forcibly ripped off her fingers and that jewelry and other similar small items were stolen; an I Pod, a phone. Things like that. That would go towards the identity. These were within several months of each other, these events, and they would go not only towards the defendant's identity but also towards the motive and purpose for robbing these items, as well as showing a common scheme of plan that was carried out by the defendant to commit similar acts of robbery.

THE COURT: Well, again, I am going to have to wait and see exactly how the evidence unfolds in the second trial. I question whether or not that would be overly prejudicial. The question whether or not it's not a rule 403 concern, but we will have to wait and see. I have my doubts about Ms. Muse being able to testify for any purpose other than rebuttal.

MS. DEGRAW: I would ask, Your Honor, as you do consider that throughout the trial, that for rule 403 purposes, that relevant evidence such as that would be admissible unless that prejudicial, or potential prejudicial, substantially outweighs the probative value and is even intended to be a very inclusive standard.

[38]Finally, the third basis for this evidence would be in anticipation of whether the defendant would testify, to again, that his testimony did open that door for character evidence. He placed character at issue by saying things such as he is not a violent person. He does not use a gun. He does not carry a gun. He is a good father, a good Christian. That information that he testified to, in the previous trial, that all is the definition of character evidence. He put forth this good positive character evidence and the government was not allowed to come back and rebut that type of character evidence ir any effective way. Obviously, cross-examination is somewhat limited.

THE COURT: I don't remember the government attempting to do so.

MS. DEGRAW: Your Honor, the government -- well, cross-examination is not going to be the most effective way to do that. The defendant just testified to I am a good father. I am a good person.

THE COURT: I don't remember disallowing a single witness that the government offered.

MS. DEGRAW: That would be the purpose of these witnesses to address that anticipated –

THE COURT: As I say, it's possible an probably likely that Ms. Muse could testify as a [39]rebuttal witness at a second trial. The scope of that testimony remains unclear. I doubt if she's going to come in and testify he beat me up every Saturday night. That's not going to come in or

be allowed. If she comes in and says -- if she is allowed to otherwise testify, she might also be asked: Do you think he was a good father? And she could say, no. But she is not going to be able to elaborate or give specific instances that Mr. Taylor was not a good father, spouse or good companion. It goes beyond the pale and overly prejudices his case.

MS. DEGRAW: Is Your Honor going to reserve that ruling based on what testimony --

THE COURT: Yeah, I'm going to reserve ruling on whether or not she is going to be allowed to testify as a rebuttal witness until the appropriate time.

MS. DEGRAW: And based on the testimony that comes forth from the defendant I've had time would --

THE COURT: Right. If he gets up and says I have a son. I used to take him fishing every Saturday, and we'd do a lot of things together and our relationship was perfect. If he says something like that, perhaps, she can come and rebut those ascertains. But if he just says I was a good dad, and I did my best, I would try to be a good Christian and treat everyone [40]fairly. There is just not much to say. That's going to be for the jury's determination whether or not that has any weight or bearing on the outcome.

MS. DEGRAW: Finally specifically, Your Honor, as to the defendant makes ascertains that he is a nonviolent person, a peace-loving person, would never harm anyone. Would the government still be limited?

THE COURT: That's a grey area. It depends on exactly what is said.

MS. DEGRAW: Thank you, Your Honor.

THE COURT: Mr. Weston, what comments do you have in response to all this.

MR. WESTON: Not much, Judge. I was going to ask the Court not to rule on it today our dismiss it, but because there is no evidence for the Court to rule.

THE COURT: We are going to allow the government to have Ms. Muse on its witness list and available to testify on rebuttal, if the government is so inclined.

MR. WESTON: I would ask the Court to limit it to the testimony at hand, and you can't rule on it until we find out what evidence is at hand.

THE COURT: Fair enough.

MS. DEGRAW: Just to clarify, I mean, Ms. Muse, is the government able to have Mr. Beale as well [41]as Officer Preston available as rebuttal witnesses as well?

THE COURT: I've forgotten what you believe they would say in rebuttal.

MS. DEGRAW: They certainly would be able to for specific contradiction purposes the defendant's capacity to carry and use a weapon.

THE COURT: Yes. If he testifies that he cannot actually carry a firearm and these witnesses, yes, his testimony can be rebutted thoroughly on that issue.

MS. DEGRAW: Also, Your Honor, as to the purpose of that incident and the malicious wounding when the defendant testified that that was for the purposes of protecting his sister. They would also be able to draw for a specific contradiction to rebut, if that was the purpose based on --

THE COURT: If he says I don't have any prior record except for this malicious wounding and that can all be explained by the fact that I was trying to protect my sister. Then I think, in all likelihood, you would be able to rebut that testimony.

MS. DEGRAW: Thank you, Your Honor.

MR. WESTON: Judge, I understand the victim of the crime is going to testify as to the facts of the [42] crime. Roanoke City Police, Officer Preston, however, investigated the cause and unless he actually saw him carry a weapon and other things --

THE COURT: I think Mr. Beale would be the primary witness to rebut any testimony that I did this in defense of my sister.

MR. WESTON: I want to point out that the officer, investigating officer, would just be reporting on hearsay. I am not sure how he would bring anything to the table

other than what Mr. Beale told him about the crime. The government proffered him as a potential witness. I just want to put out there that I'm not sure an investigating officer is a proper witness in this case.

THE COURT: Unless he is able to testify as to something that Mr. Taylor said about that incident.

MR. WESTON: I understand.

THE COURT: Anything else?

MS. DEGRAW: No, Your Honor.

THE COURT: Mr. Weston, anything on your part?

MR. WESTON: No, Your Honor.

THE COURT: All right. Then we'll try to set these rulings to writing. I won't go into any detail on legal briefs. I will just state what the [43]Court's ruling has been on each of these matters and have that order entered in the next day or so. We'll see all of you on the day and time set for trial.

Ask the marshal to declare Court in recess pending return of court.

(Proceedings concluded at 12:05 p.m.)

* * * * *

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED JANUARY 4, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal Action No. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

ORDER

Before: Hon. Glen E. Conrad
Chief United States District Judge

The parties filed cross-motions regarding evidence to be presented at the second trial in this case. Based upon the reasons stated in open court, it is hereby **ORDERED** as follows:

1. The defendant's motion to have an expert witness appointed regarding identification issues (Docket No. 62) is **DENIED**;

2. The defendant's motion *in limine* regarding evidence of cocaine (Docket No. 95) is **TAKEN UNDER ADVISEMENT**;

3. The government's motion *in limine* as to certain photographs of the defendant (Docket No. 77) is **DENIED**;

4. The government's motion *in limine* as to evidence or argument concerning the impact of Virginia-grown marijuana on interstate commerce is **GRANTED**; and

5. The government's notices of intent to introduce evidence pursuant to Federal Rule of Evidence 404(b) (Docket Nos. 80 and 81) are **TAKEN UNDER ADVISEMENT.**

ENTER: This 4th day of January, 2013.

/s/
Chief United States District Judge

APPENDIX H — EXCERPT FROM JURY INSTRUCTIONS

It is now time for me to instruct you as to the substantive law that will govern your consideration of this case. The defendant is charged with several offenses; each offense is charged in a separate count of the indictment. The number of the offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether to the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.

I tell you that merely because you find the defendant guilty of one of the offenses stated in one count of the indictment, that does not, in and of itself, establish his guilt under any of the other offenses charged in the indictment.

Counts One and Three of the indictment charge the defendant with obstructing, delaying, or affecting interstate commerce by means of robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951.

It is charged in Count One of the Indictment that on or about October 21, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR, did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms

"commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, as well as a cellular telephone, from the person and property of "WL," against WL's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to WL's person and the persons of his family, and did aid and abet in the same, in violation of Title 18, United States Code, Sections 1951(a) and 2.

It is charged in Count Three of the indictment that on or about August 27, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR, did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, from the person of "JW," against JW's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to JW's person and the persons of his family, and did aid and abet in the same, in violation of Title 18, United States Code, Sections 1951(a) and 2.

The defendant has been charged with violations of the Hobbs Act, that is, with obtaining certain property

through robbery. To find the defendant guilty of these charges, the government must prove three elements beyond a reasonable doubt:

FIRST: that the defendant knowingly obtained or took the personal property of another, or from the presence of another;

SECOND: that the defendant took this property against the victim's will, by actual or threatened force, violence, or fear of injury, whether immediately or in the future; and

THIRD: that as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was delayed, obstructed, or affected in any way or degree.

In considering the third element of the offenses charged in Counts One and Three, whether there has been an obstruction, delay, or effect on interstate commerce, I tell you that the government has met its burden of proof if you find and believe from the evidence, beyond a reasonable doubt, that the defendant reduced the movement of articles and commodities in interstate commerce, in this case, illegal drugs and drug proceeds, or attempted to do so, by the robberies charged in Counts One and Three. It is not necessary for the government to prove that the defendant intended to affect interstate commerce. Rather, this element may be proven by evidence that a defendant's

actions were likely to affect interstate commerce, even though the actual impact on commerce is small.

If you unanimously find that the government has proved beyond a reasonable doubt each of these three elements as to the robbery charged in Count One, then you must find the defendant guilty of that crime.

Likewise, if you unanimously find that the government has proved beyond a reasonable doubt each of these three elements as to the robbery charged in Count Three, then you must find the defendant guilty of that crime.

You must consider the offenses charged in Counts One and Three of the indictment separately, and decide whether the government has proved beyond a reasonable doubt the elements of each offense, only one of the offenses, or neither of the offenses.

The defendant has also been charged with attempting to commit a crime, that is, with attempting to commit robbery.

To find the defendant guilty of this charge, the government must prove two elements beyond a reasonable doubt:

FIRST: that the defendant had "culpable intent to commit the crime charged";

SECOND: that the defendant took "a substantial step towards the completion of the crime that strongly corroborates that intent."

Appendix H

In determining this second element whether the defendant took the required substantial step you are instructed that a substantial step is more than mere preparation but less than completion of the crime.

Finally, while the evidence must show more than "mere preparation" to support conviction, factual impossibility is not a defense to an attempted robbery. In other words, if the evidence proves criminal intent and a substantial step towards completion of the crime, you may find the defendant guilty even if it would have been impossible for him to have, in fact, completed the crime.

The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his or her will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his or her person or property, or property in his or her custody or possession, or the person or property of a relative or member of his or her family or of anyone in his or her company at the time of the taking or obtaining.

The term "commerce" means any commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Appendix H

The term "property," as used in these instructions, means money or anything of value, and may include items which cannot be legally possessed.

APPENDIX I — SPECIAL VERDICT FORM IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED JANUARY 25, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal Action No. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

SPECIAL VERDICT FORM

Before: Hon. Glen E. Conrad
Chief United States District Judge

COUNT ONE

1. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly and unlawfully taking and obtaining, or attempting to take or obtain, by robbery, items having an effect on interstate commerce by means of actual and threatened force, violence, and fear of injury on or about October 21, 2009?

☒	☐
YES	NO

Appendix I

COUNT TWO

2. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly possessing a firearm in furtherance of a robbery that occurred on or about October 21, 2009?

☐	☒
YES	NO

COUNT THREE

3. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly and unlawfully taking and obtaining, or attempting to take or obtain, by robbery, items having an affect on interstate commerce by means of actual and threatened force, violence, and fear of injury on or about August 27, 2009?

☒	☐
YES	NO

COUNT FOUR

4. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly possessing a firearm in furtherance of a robbery that occurred on or about August 27, 2009?

☒	☐
YES	NO

/s/_____
Foreperson's Signature

/s/_____
Foreperson's Printed Name

January 25, 2013
Date

APPENDIX J — NOTICE OF APPEAL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, FILED APRIL 25, 2013

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

CRIMINAL NO. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

NOTICE OF APPEAL

Notice is hereby given that David Anthony Taylor, Defendant in the above named case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on April 23, 2013.

Date: April 25, 2013

/s/ Seth C. Weston, Esq.
Seth C. Weston
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APPENDIX K — PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-4316

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID ANTHONY TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Glen E. Conrad, Chief District Judge. (7:12-cr-00043-GEC-1)

Argued: May 15, 2014 Decided: June 6, 2014

Before WILKINSON and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Thacker and Senior Judge Hamilton joined.

Appendix K

WILKINSON, Circuit Judge:

David Anthony Taylor appeals his convictions for two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and one count of using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Taylor contends both that the government failed to introduce sufficient evidence to establish that his robberies affected interstate commerce and that the district court erred in prohibiting him from showing that the particular drugs he was seeking to steal did not affect interstate commerce. Pursuant to Supreme Court precedent supporting the broad ability of Congress to punish the disruption of interstate commerce and our own conforming decisions in *United States v. Tillery*, 702 F.3d 170 (4th Cir. 2012), and *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003), we affirm his convictions.

I.

A.

Taylor was a member of the "Southwest Goonz," a group of robbers led by George Fitzgerald and based in Roanoke, Virginia. The Goonz focused on robbing drug dealers because they typically have drug proceeds in their homes and, because of the illegal nature of their activities, they are reluctant to report crime to the authorities. Taylor persuaded Fitzgerald to take him on several planned home invasions in order to steal drugs and drug proceeds, such as money and jewelry.

One of these break-ins was planned for the residence of Josh Whorley, where his girlfriend Latasha Graham and her two children also lived. Fitzgerald chose Whorley's home because he had learned that Whorley sold an exotic and high grade of marijuana, a belief that he communicated to Taylor and two other group members. The robbers expected to find both drugs and money there.

Their expectations were not unreasonable, because Whorley had both used and sold drugs in the past. Graham herself was a regular marijuana user. Additionally, Whorley's house had been broken into twice prior to the August 27, 2009 robbery, and a housemate had been held at gunpoint in the driveway.

Taylor and his associates robbed Whorley's house on the night of August 27. The four robbers kicked in the front door and held guns to Whorley and Graham while searching the house. During the robbery, Taylor hit Graham in the head with his pistol, groped her, and clawed the rings off her fingers. Whorley was also repeatedly struck by one of the robbers. The robbers demanded that Graham tell them where the money and marijuana were located. All in all, the robbers made off with Graham's jewelry, $40 from her purse, two cell phones, and a marijuana cigarette.

Another break-in was planned for the home of William Lynch, who lived together with his wife, Whitney Lynch, and their three children. Fitzgerald chose Lynch's home because he had been told by a previously reliable source that Lynch sold marijuana. The source further informed

Fitzgerald that on a prior occasion he had personally robbed Lynch, also known as "W.T.," of twenty pounds of marijuana. Lynch surrounded himself with people who used and possessed drugs. Taylor and Fitzgerald both expected to recover marijuana and drug proceeds during the home invasion.

The Goonz robbed Lynch's residence on October 21, 2009. Taylor initiated the robbery by knocking on the front door. After he entered the home, Fitzgerald and another group member followed. Once inside, Taylor held Lynch and his six-year old son at gunpoint in the living room, while another robber forced Lynch's nine-year old daughter from her bedroom into the living room. Fitzgerald asked Lynch to tell him where the marijuana was located. Lynch insisted that he did not have it and claimed that it was in another man's possession. Whitney Lynch emerged from her bedroom at the sound of the commotion and was assaulted by a robber, who attempted to remove her pants. She struggled with him while he demanded that she show him where the money and drugs were located. She was then dragged into the living room by her hair. The three robbers eventually took Lynch's cell phone and departed.

B.

On July 26, 2012, Taylor was indicted by a grand jury in the Western District of Virginia on two counts of Hobbs Act robbery under 18 U.S.C. § 1951(a) and two counts of using a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). Taylor's first trial resulted in a hung jury.

Appendix K

A second trial was conducted from January 23 to 25, 2013. Before the second trial commenced, the government moved to preclude Taylor from offering evidence that robbing a drug dealer who sells marijuana grown within the borders of Virginia does not affect interstate commerce and thus does not violate the Hobbs Act. Taylor filed a Motion to Dismiss, contending that such a ruling would violate his constitutional right to present a complete defense. The district court held a hearing after which it granted the government's motion on the grounds that the enterprise of drug dealing affects interstate commerce as a matter of law under *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003). See also *United States v. Tillery*, 702 F.3d 170, 175 (4th Cir. 2012) (upholding conviction for Hobbs Act robbery of a business because it impacted interstate commerce "in the aggregate").

On January 25, the jury convicted Taylor on three of the four counts in the indictment, including both of the Hobbs Act offenses. With regard to the Hobbs Act crimes, the jury found Taylor guilty of "knowingly and unlawfully taking and obtaining, or attempting to take or obtain, by robbery, items having an effect on interstate commerce by means of actual and threatened force, violence, and fear of injury." J.A. 702. Taylor moved to set aside the verdict on the basis that the government had not offered evidence that Taylor's actions had affected interstate commerce. The district court denied Taylor's motion. The court then sentenced Taylor to 336 months in prison followed by supervised release for three years. Taylor now appeals.

II.

Taylor argues that the government failed to present sufficient evidence that his robberies affected interstate commerce under the Hobbs Act. He also contends that the district court erred in prohibiting him from showing that his robberies of dealers of Virginia-grown marijuana likely did not impact interstate commerce.

A.

We note at the outset the extraordinary breadth and reach of the Hobbs Act. That law reads, in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished].

18 U.S.C. § 1951(a). A Hobbs Act crime, then, has two elements: "(1) robbery or extortion, and (2) interference with commerce." *Tillery*, 702 at 174. With regard to the second element, it is impossible to ignore Congress' repeated use of the word "any." Indeed, the Supreme Court has recognized that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce . . . ." *Stirone v. United States*,

361 U.S. 212, 215 (1960). Thus, the jurisdictional predicate of the Hobbs Act requires only that the government prove a "minimal" effect on interstate commerce. *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976).

Such an impact is not difficult to show. The effect may be so minor as to be *de minimis*, *United States v. Buffey*, 899 F.2d 1402, 1404 (4th Cir. 1990), and may be demonstrated by "proof of probabilities," *United States v. Brantley*, 777 F.2d 159, 162 (4th Cir. 1985). Moreover, the government is not required to prove that the "defendant intended to affect commerce or that the effect on commerce was certain; it is enough that such an effect was the natural, probable consequence of the defendant's actions." *Williams*, 342 F.3d at 354.

To determine whether a robbery affects commerce, we do not simply examine the effect of the individual action in question; it is sufficient that the "relevant class of acts" has a measureable impact on interstate commerce. *Tillery*, 702 F.3d at 174 (internal quotation marks omitted). Considering the class of activities in the aggregate in order to determine whether they impact interstate commerce is nothing new. The Supreme Court has repeatedly found that Congress may regulate conduct under the Commerce Clause that, in the aggregate, impacts interstate commerce. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 18-19, 22 (2005) (holding that Congress may regulate intrastate marijuana market because of its aggregate impact on interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (finding that Congress is permitted to regulate activities that, when "taken

together with th[ose] of many others similarly situated," have an effect on interstate commerce).

We have likewise recognized that, because the Hobbs Act reflects the full breadth of Congress' commerce power, the aggregation principle applies in the Hobbs Act context. *See Tillery*, 702 F.3d at 174-75; *Williams*, 342 F.3d at 355. Indeed, to focus exclusively on an individual act would wholly undermine Congress' purpose in adopting the Hobbs Act: to protect commercial, interstate activity from criminal disruption. *See United States v. Culbert*, 435 U.S. 371, 373 (1978) (finding that the words of the Hobbs Act "do not lend themselves to restrictive interpretation").

In so ruling, we note the large number of circuits that agree that the aggregation principle applies in the context of a Hobbs Act violation. *See United States v. Powell*, 693 F.3d 398, 402 (3d Cir. 2012) ("[B]ecause the Hobbs Act contains a jurisdictional element and criminalizes the 'fundamentally economic' crimes of robbery and extortion, violations of the Act have a substantial effect on interstate commerce in the aggregate, and the government need not prove a substantial effect in each individual case.") (citations omitted); *United States v. Robinson*, 119 F.3d 1205, 1214 (5th Cir. 1997) (same); *United States v. Davis*, 473 F.3d 680, 683 (6th Cir. 2007) (same); *United States v. Marrero*, 299 F.3d 653, 655 (7th Cir. 2002) (same); *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (same); *United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (same). "Any other rule would leave the federal government helpless to deal with criminal acts that have an individually trivial but cumulatively significant effect

on the movement of goods and services across state and international boundaries." *United States v. Thomas*, 159 F.3d 296, 298 (7th Cir. 1998).

The requirement that the precise effect on commerce be traced in each and every case would not only damage the aggregation principle and the class of acts principle that underlies it; it would also raise concerns of practicality which militate against a requirement of showing every charged crime's precise commercial effect. *See Marrero*, 299 F.3d at 655 ("Nor is it necessary that the individual criminal act . . . be shown to have a measurable impact on commerce, which would usually be impossible to show. It is enough if the class of acts has such an impact."). To the extent that *United States v. Needham*, 604 F.3d 673 (2d Cir. 2010), is in tension with our holding, we note simply the observation of Judge Cabranes that "'commerce' for purposes of the Hobbs Act -- that is, 'commerce over which the United States has jurisdiction,' 18 U.S.C. § 1951(b) -- encompasses marijuana that is grown, processed, and sold entirely within a single state." *Id.* at 688 (Cabranes, J., dissenting in part and concurring in part). If there is to be a "marijuana exception" to traditional Hobbs Act principles, that is a policy choice for the Congress to make. Until it does, we shall follow the plain lessons of Supreme Court cases and our own precedent, which must of necessity govern our disposition of this case.

It is of no relevance that the market for a certain commodity may be illegal. The jurisdictional predicate in the Hobbs Act speaks of "commerce," not just "legal" or "legitimate" commerce, and commerce is well understood

to encompass unlawful transactions. *See Raich*, 545 U.S. at 18-19 (holding that the Commerce Clause empowers Congress to regulate and criminalize the national market for marijuana). Drug dealing is a commercial enterprise and robberies of drug dealers threaten that enterprise; that is enough for a federal court to exercise jurisdiction under the Hobbs Act. *See Williams*, 342 F.3d at 354 (finding that "robberies of drug dealers . . . impact[] a trade that plainly is both economic and interstate in character").

Finally, it is not dispositive that the robberies involved the invasion of the victims' homes. Many businesses, including illegal drug enterprises, operate out of homes. As the Supreme Court has emphasized, commercial activities in or near the home may have a significant cumulative effect upon interstate commerce. *See Raich*, 545 U.S. at 19 (holding that, "when viewed in the aggregate, . . . Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions"); *Wickard*, 317 U.S. at 128 ("It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions."). Thus, the locus of the commercial activity is not the litmus test of a Hobbs Act violation.

B.

We now turn to the merits of Taylor's claims. He first contends that the government was required to offer particularized evidence that his personal robberies

affected interstate commerce and that, because the government offered no such evidence, the district court lacked jurisdiction over his prosecution under the Hobbs Act. In an appeal contesting the sufficiency of the evidence, we view "the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government" and uphold the verdict if it is supported by substantial evidence. *Williams*, 342 F.3d at 355 (internal quotation marks omitted).

At the conclusion of trial, the district court instructed the jury on the jurisdictional element as follows:

> In considering . . . whether there has been an obstruction, delay, or effect on interstate commerce, I tell you that the government has met its burden of proof if you find and believe from the evidence beyond a reasonable doubt that the defendant reduced the movement of articles and commodities in interstate commerce, in this case illegal drugs and drug proceeds, or attempted to do so by the robberies charged in Counts One and Three.
>
> It is not necessary for the government to prove that the defendant intended to affect interstate commerce; rather, this element may be proven by evidence that a defendant's actions were likely to affect interstate commerce, even though the actual impact on commerce is small.

J.A. 673-74. These instructions were in accord with the law as described above and Taylor's argument thus rests solely on the sufficiency of the evidence with regard to the jurisdictional predicate. But while Taylor contends that the government failed to prove the jurisdictional element, we find that the jury could rationally have found that the government met its burden.

First, it was entirely reasonable for the jury to conclude that the robberies "would have the effect of depleting the assets of an entity engaged in interstate commerce." *Buffey*, 899 F.2d at 1404. In *Williams*, we found that drug dealing was "an inherently economic enterprise that affects interstate commerce." 342 F.3d at 355. Although *Williams* involved cocaine and Taylor's robberies involved marijuana, the principle of aggregation does not apply differently for different drugs. *See Raich*, 545 U.S. at 18-19 (applying the aggregation principle to the market for marijuana). Because drug dealing in the aggregate necessarily affects interstate commerce, the government was simply required to prove that Taylor depleted or attempted to deplete the assets of such an operation.

Sufficient evidence was adduced at trial for a rational jury to find that Whorley was a drug dealer and that Taylor depleted or attempted to deplete his assets during the August 27 robbery. The record shows that the Goonz were in the business of robbing drug dealers, Fitzgerald testified that he selected Whorley's house to rob because he was informed that a drug dealer lived there, and testimony further revealed that Taylor took part in the

robbery because he expected to find drugs and drug proceeds in the home. Furthermore, Whorley admitted to having sold drugs in the past and Graham did in fact possess marijuana at the time of the robbery. A Roanoke City detective testified that drug dealers are commonly victims of repeated home invasions and that he suspected Whorley of being a drug dealer because Whorley's house had been broken into at least twice prior to the August 27 robbery.

Additionally, the money, jewelry, cell phones, and marijuana cigarette that Taylor stole are sufficient to meet the *de minimis* standard under the depletion-of-assets theory. "We have never held . . . that the depletion of assets theory has a dollar-amount minimum." *Tillery*, 702 F.3d at 175. But even if these items together do not meet that low threshold, the jury could rationally have concluded that Taylor *attempted* to steal drugs and drug proceeds, and therefore satisfied the Hobbs Act jurisdictional element. *See Brantley*, 777 F.2d at 163-64 (holding that Hobbs Act jurisdictional element may be satisfied by inchoate crimes).

Likewise, the government proffered sufficient evidence for a rational jury to conclude that Lynch was a drug dealer and that Taylor depleted or attempted to deplete his assets in the October 21 robbery. As with the robbery of Whorley, the Goonz was a group dedicated to robbing drug dealers. Fitzgerald testified that he had received intelligence from a reliable informant that Lynch was a drug dealer and had previously been robbed of twenty pounds of marijuana. Additional testimony revealed that Taylor thought there would be drugs and

drug proceeds in the house. Fitzgerald called Lynch by his nickname, "W.T.," and, when he demanded that Lynch hand over the drugs, Lynch told him that the marijuana was with another person. Moreover, a federal officer testified that Lynch admitted that he had sold drugs before the robbery without his wife's knowledge and Lynch's wife testified that he associated with suspicious characters who used and possessed illegal drugs. As with Whorley, the jury could rationally have found that Taylor attempted to deprive Lynch's operation of both drugs and drug proceeds and found jurisdiction accordingly. There was thus sufficient evidence at trial for the jury to have determined that the jurisdictional element was satisfied under a depletion-of-assets theory for both the Whorley and Lynch robberies.

Apart from the effect on the assets of an operation whose character involves interstate commerce, there was evidence that the defendant intentionally targeted a business engaged in interstate commerce. *See Powell*, 693 F.3d at 405. While evidence of the defendant's intent is not required to prove that his robberies had an impact on interstate commerce, that intent is still probative on the question of whether his actions would have had the "natural consequence[]" of affecting such commerce. *See id.* (finding jurisdictional element met because defendant "deliberately sought to rob business owners to obtain proceeds of businesses engaged in interstate commerce").

Under the targeting theory, a defendant who robs a victim in the belief that he will recover the proceeds of an enterprise engaged in interstate commerce will not

fortuitously escape prosecution under the Hobbs Act because his target did not possess those proceeds at the precise time of the robbery. *See Brantley*, 777 F.2d at 162 ("It may be enough [to prove the jurisdictional predicate] that the parties intended to complete a transaction which would have affected commerce, though their intention was frustrated."). The amount of cash on hand in a drug dealing enterprise fluctuates dramatically; the victims were doubtless targeted by Taylor and the other Goonz in the hope they would be found at a flush moment. That they were not does nothing to vitiate Taylor's intent to target an enterprise which by its nature engages in interstate commercial activity.

The evidence here was thus sufficient for two independent reasons. Whether viewed through the lens of the effect of the defendant's crimes (depletion of assets) or his intent (targeting), the government adduced sufficient evidence in this case to meet the jurisdictional element of the Hobbs Act. We therefore sustain Taylor's Hobbs Act convictions.* As Taylor challenged his conviction for

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* Taylor's second argument is that the district court erred in granting the government's pretrial motion in limine precluding him from presenting evidence that the marijuana at issue was grown in Virginia and thus was not connected to interstate commerce. We review the district court's evidentiary rulings for abuse of discretion. *United States v. Moore*, 27 F.3d 969, 974 (4th Cir. 1994).

The district court found that, because drug dealing enterprises inherently affect interstate commerce, any argument or evidence tending to show that the drugs in the particular case had not moved across state lines was not relevant. For the reasons expressed in Part II. A, *supra*, that ruling was correct, and the

using or carrying a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c) solely on the ground that the Hobbs Act predicate was infirm, that conviction too must be upheld.

This is not to imply that the reach of the Hobbs Act is without limits. All robberies are disruptive, but not every disruption is an obstruction of commerce. The Sixth Circuit, for example, held that the jurisdictional element of the Hobbs Act was not satisfied when the defendant stood convicted of robbing "private citizens in a private residence" of money, some of which just happened to "belong[] to a restaurant doing business in interstate commerce." *United States v. Wang*, 222 F.3d 234, 240 (6th Cir. 2000). Whatever connection between the robbery and the business was absent in *Wang* is plainly present in the case at bar.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

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trial court necessarily did not abuse its discretion in granting the government's motion.